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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

—against—

STATE OF MONTANA, TED SCHWINDEN, GOVERNOR OF MONTANA, HELEN J. FEAVER, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and MAURICE L. BRUSETT, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF OF APPELLANTS

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January, 1981

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OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, *et al.*,

Appellants,

—against—

STATE OF MONTANA, *et al.*,

Appellees.

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QUESTIONS PRESENTED

This action, challenging the constitutionality of a 30% severance tax imposed by the State of Montana on coal mined in the state, presents the following questions:

1. Did the state court err in holding that the State of Montana may, without violating the Commerce Clause, tax without limit the severance of coal which is largely federally owned and destined for immediate shipment to other states?

2. Did the state court err in holding, without any factual examination whatsoever, that the 30% severance

tax is "fairly related" to the services and protection provided by the state to the taxpayer merely because Montana affords the benefits of a civilized society?

3. Did the state court err in rejecting plaintiffs' claim that the Montana Coal Severance Tax discriminates against interstate commerce notwithstanding the fact that the tax was manifestly "tailored" to fall principally on persons in states other than Montana?

4. Did the state court err in rejecting plaintiffs' claim that the Montana Coal Severance Tax violates the Supremacy Clause of the United States Constitution, despite plaintiffs' allegation and proffer of proof that the tax substantially frustrates the effectiveness of federal statutes intended to encourage the production and use of coal in general, and particularly western coal, and despite defendants' admission, for purposes of the present proceeding, of the truth of the underlying facts?

5. Did the state court err in denying plaintiffs an opportunity to prove at a trial their claim that the Montana Coal Severance Tax violates the Supremacy Clause of the United States Constitution, despite plaintiffs' allegation and proffer of proof that the tax substantially frustrates the national policy embodied in the Mineral Lands Leasing Act of 1920 which reserved federally-owned coal to the federal government and allocated the revenues, as between the states and the federal government, in a fixed proportion?

PARTIES TO THE PROCEEDINGS BELOW

All of the parties appearing in the Supreme Court of the State of Montana are listed in the caption, except that, pursuant to Supreme Court Rule 40.3, Ted Schwinden, Helen J. Feaver and Maurice L. Brusett have been substituted as defendants for Thomas L. Judge, Mary Craig and David M. Lewis, respectively.

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Exxon Corp. v. *Governor of Maryland*, 437 U.S. 117 (1978) 44

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Merrion v. *Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir.) (*en banc*), *cert. granted*, 101 S. Ct. 71 (1980) 25, 31

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National Geographic Society v. *California Equalization Board*, 430 U.S. 551 (1977) 28

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Oliver Iron Mining Co. v. *Lord*, 262 U.S. 172 (1923) 17

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Washington Revenue Department v. *Stevedoring Association*, 435 U.S. 734 (1978) 28, 31

Weston v. *The City Council of Charleston*, 27 U.S. (2 Pet.) 449 (1829) 41

Wickard v. *Filburn*, 317 U.S. 111 (1942) 18, 21

Constitutions, Statutes & Regulations

Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676 *et seq.*, as amended, 42 U.S.C. (Supp. III 1979) §§ 7401 *et seq.* 5, 7, 38

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40 C.F.R. § 60.45(a)(2)(1972) 38

Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871, 42 U.S.C. §§ 6201 *et seq.* (1976 & Supp. III 1979) 5

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Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233..... 5

Energy Research and Development Administration Act (Authorizations and Appropriations for 1977), Pub. L. No. 95-39, 91 Stat. 180 5

Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 246, 15 U.S.C. §§ 791 *et seq.* (1976 & Supp. III 1979)... 5

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Federal Non-Nuclear Energy Research and Development Act of 1974, Pub. L. No. 95-577, 88 Stat. 1878, 42 U.S.C. §§ 5901 *et seq.* (1976 & Supp. III 1979) 5

36 Fed. Reg. 24876 (1971)..... 38

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Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437 ..... 5, 14, 16, 46-50

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Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289, 42 U.S.C. (Supp. III 1979) §§ 8301 *et seq.* 5, 37,

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§ 39-2-402..... 9

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§ 39-6-303(a)..... 9

Legislative History

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58 Cong. Rec. 7646 (1919) (remarks of Rep. Mondell) 48

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H.R. Rep. No. 95-496 (Part IV), 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 8454 37

H.R. Rep. No. 294, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. Code Cong. & Ad. News 1077-1577 39

H.R. Rep. No. 17 (Part 1), 64th Cong., 1st Sess. 3 (1916) 46

H.R. Rep. No. 17 (Part 2), 64th Cong., 1st Sess. 8 (1916) (minority views) 46

H.R. Rep. No. 668 (Part 2), 63d Cong., 2d Sess. 6 (1914) (minority views) 46

Remarks of Douglas M. Costle, Administrator of the Environmental Protection Agency, [1978] U.S. Code Cong. & Ad. News 8232 37

S. Rep. No. 95-361, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 8173 ... 37

Other Authorities

Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L.J. 219 (1957) 23

Bureau of Land Management of the Department of Interior, *Final Environmental Statement, Federal Coal Management Program* (April 1979) 39

T.O. Cohea, *Coal Board Grants* (January 11, 1978) 11

Developments in the Law: Federal Limitations on State Taxation of Interstate Business, 75 Harv. L. Rev. 953 (1962) 23

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Environmental Protection Agency, *Tables Relating to New Standards for New Coal-Fired Power Plants* (May 25, 1979) 39

R. Givens, *Chief Justice Stone and the Developing Functions of Judicial Review*, 47 U. Va. L. Rev. 1321 (1961) 33

W. Hellerstein, *Constitutional Constraints on State and Local Taxation of Energy Resources*, 31 Nat. Tax J. 245 (1979) 23, 33

James R. Schlesinger, Remarks before 61st Anniversary Convention of the National Coal Association (June 6, 1978) (unpublished Department of Energy Release) 36

National Energy Plan II (May 7, 1979) 36

Kalispell Representative Says Coal Tax Too Low, The Missoulian, January 11, 1975 6

Posner, *Economic Analysis of the Law* (2d ed. 1977) 23

President Carter, Statement on Signing National Energy Bills (November 9, 1978), *reprinted in Weekly Compilation of Presidential Documents*: Vol. 14, No. 45 36

Rand Corporation, *Coal Development and Government Regulation in the Northern Great Plains: A Preliminary Report* (August 1976) 5

Robinson, Office of the Montana Legislative Fiscal Analyst, *Coal Impact and Coal Board Grants* (September 20, 1977) 11

C. Sands, *Sutherland Statutory Construction* (4th ed. 1972-73) 38, 48

PAGE

Stern, *The Commerce Clause and the National Economy, 1933-1946,* 59 Harv. L. Rev. 645 and 883 (1946) 19

Surface Mining Control and Reclamation Act of 1977: Hearings on S. 7 Before the Senate Subcommittee on Public Lands and Resources of the Senate Committee on Energy and Natural Resources, 95th Cong., 1st Sess. (1977) 11

Tribe, *American Constitutional Law* (1978) 32

Towe, *Explanation of Reasons for Montana's Coal Tax* 34

U.S. Department of Energy, *Energy Supply and Demand in the Midterm: 1985, 1990, and 1995* (April 1979) 39

DECISION OF THE COURT BELOW

The decision of the Supreme Court of the State of Montana, dated July 17, 1980, is reported at 615 P.2d 847. It is also reprinted in the Appendix to the Jurisdictional Statement at pages 1a-40a.*

JURISDICTIONAL BASIS OF THIS APPEAL

This is an appeal from a final judgment entered pursuant to the decision of the Supreme Court of the State of Montana upholding the dismissal of Complaints challenging the constitutionality of the Montana Coal Severance Tax. *See* MONT. CODE ANN. §§ 15-35-101 *et seq.* (1979). Judgment was deemed to have been entered on July 17, 1980, when the decision of the court below was docketed by the Clerk of the Supreme Court of the State of Montana. Notices of Appeal were filed with the Clerk of that court on October 2 and 6, 1980. This Court has jurisdiction of this appeal by virtue of 28 U.S.C. § 1257 (2) (1976). Probable jurisdiction was noted at 49 U.S.L.W. 3428 (December 9, 1980).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case raises questions concerning the validity of the Montana Coal Severance Tax under the Commerce and Supremacy Clauses of the United States Constitution, art. I, § 8, cl. 3 and art. VI, cl. 2, respectively, and many federal statutes encouraging, mandating or regulating the

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* "Apdx." refers to the Appendix to the Jurisdictional Statement. "J.A." refers to the Joint Appendix.

use of coal.* The text of these authorities, insofar as presently pertinent, is set out in the Appendix to appellants' Jurisdictional Statement.

STATEMENT OF THE CASE

In 1975, at the height of the energy crisis, Montana increased its severance tax on coal to an unprecedented 30%. This case thus involves an attempt by one state, having an abundant supply of a vital natural resource—here low sulphur coal—to exact a tribute from the inhabitants of her energy-poor sister states. Montana's policy has been described as one of "OPEC-like revenue maximization", having no relationship to any legitimate needs of the state.** As noted by one of its principal sponsors, "[i]n the energy crunch today, Montanans should remem-

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* *E.g.*, Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676, as amended, 42 U.S.C. (Supp. III 1979) §§ 7401 *et seq.*; Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871, 42 U.S.C. §§ 6201 *et seq.* (1976 & Supp. III 1979); Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233; Energy Research and Development Administration Act (Authorizations and Appropriations for 1977), Pub. L. No. 95-39, 91 Stat. 130; Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 246, 15 U.S.C. §§ 791 *et seq.* (1976 & Supp. III 1979); Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, 90 Stat. 1083; Federal Non-Nuclear Energy Research and Development Act of 1974, Pub. L. No. 95-577, 88 Stat. 1878, 42 U.S.C. §§ 5901 *et seq.* (1976 & Supp. III 1979); Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437; Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350, 15 U.S.C. (Supp. III 1979) §§ 3301 *et seq.*; Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289, 42 U.S.C. (Supp. III 1979) §§ 8301 *et seq.*

** Rand Corporation, *Coal Development and Government Regulation in the Northern Great Plains: A Preliminary Report* 148 (August 1976).

ber that the Arabs have the oil but Montana has the coal. . . ."*

Montana does not own any significant portion of this coal. Indeed, three-quarters of the coal in Montana belongs to the federal government. Most of the remainder is privately owned. What Montana here seeks to do is to force the rest of the country to pay Montana an excessive tax for the use of a vital natural resource fortuitously located within its borders. While the tax is a severance tax in form, it is in fact an export duty, since virtually all of the coal subject to the tax is destined for interstate shipment under long-term contracts which provide, in effect, that the tax will be passed along to ultimate consumers in other states.

Appellants have conceded from the outset that the severance of natural resources within a state is an appropriate subject of that state's taxation. They assert, however, that this state power is ultimately limited by both the Commerce Clause and the Supremacy Clause, and that the tax in question here must be struck down because it imposes an undue burden on interstate commerce and substantially frustrates the achievement of vital federal policies.

Montana and its courts have taken the position that the Constitution imposes no such limits on the power of that state to impose such taxes. According to Montana, a tax equal to 100%, or even 1,000% or 2,000%, of the value of the coal may be imposed, and neither the Commerce

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* Representative Ora Halvorson of Kalispell, Montana, Vice Chairman of the Montana House Taxation Committee, quoted in *Kalispell Representative Says Coal Tax Too Low*, The Missoulian, January 11, 1975.

Clause nor the Supremacy Clause can be invoked to prevent it.

This case thus presents fundamental constitutional questions of the state's power to impose taxes in a factual context of extreme importance. If ultimately upheld, Montana's Coal Severance Tax foreshadows a trend in state taxation of energy resources which can only lead to the Balkanization of this nation in the same way that OPEC's efforts have fragmented the world economy. The far-reaching question presented by this appeal is whether the United States Constitution limits the power of energy-rich states to exact unlimited tribute in the form of taxes from the rest of the country, where there is no legitimate need for such taxes and the taxes, themselves, may have adverse effects on interstate commerce and on national policies designed to meet the energy needs of the nation. The view of state power advanced by the court below seriously jeopardizes the concept of a national free trade area, the creation of which was the central purpose of the Commerce Clause.

Statement of Facts

In 1975, in response to increased demand for low sulphur coal generated largely by the Clean Air Act of 1970, and in the aftermath of the 1973 Arab oil embargo, Montana increased its severance tax on coal to unprecedented levels. As a result, substantially all of the coal now mined in the state is taxed at 30% of value.* This is, by far, the highest rate in the nation. Coal taxed at the rate

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* Value is defined as the "contract sales price," *i.e.*, the price of coal after being extracted and prepared for shipment f.o.b. mine, less production taxes. MONT. CODE ANN. § 15-35-102 (1979).

of 34 cents per ton prior to the 1975 amendment is now typically taxed at the rate of $2.08 per ton, with some taxpayers presently paying as much as $4.63 per ton. On a percentage basis, the increases from 1975 to date thus amount to from 500% to 1,250%.

It is clear that the tax has a substantial effect on interstate commerce and was always intended to do so. As the Montana legislature well knew at the time this tax was passed, the great bulk of coal mined in Montana is immediately shipped out of state pursuant to long-term coal purchase agreements which provide that the costs of taxation will be passed along to the consuming utilities. (Complaint ¶ 17; Apdx. 53a). These utilities, in turn, adjust the price of electricity to their customers to reflect increased fuel costs. In 1979, such out-of-state shipments aggregated 28 million tons of coal, accounting for at least 90% of the value of Montana's entire production. Plaintiffs paid severance taxes of about $60 million on these shipments. Under the terms of existing contracts, they estimate that the amount payable over the next two decades will reach several billion dollars.

The fact that the tax would ultimately be borne by consumers in other states loomed large in its adoption. While the technical incidence of the tax is on the coal producing plaintiffs in Montana, selection of coal as the object of this extraordinary tax permitted the Montana legislature to export the practical effect of the tax to consumers in other states who are unable to vote in Montana. For reasons such as these, the tax has enjoyed unparalleled popularity within Montana. Since its passage, there has been no substantial opposition to it.

It is equally clear that the tax will have a substantial adverse effect on the many efforts of Congress to shift

this nation's energy reliance away from foreign petroleum products and toward increased reliance upon coal. The vast resources of coal found in the western United States—much of it owned by the federal government—are a cornerstone of these vital policies. The excessive costs imposed by this tax manifestly tend to frustrate the central purpose of the many statutes designed to encourage or mandate the use of coal.*

Montana finds itself able to exact taxes of this magnitude because of its unique position with respect to coal. One-quarter of our entire national reserves, and over one-half of our national reserves of low sulphur coal, are located in Montana. Montana and Wyoming together contain 40% of this nation's coal and 68% of its low sulphur reserves.** But this is not to say that the coal "belongs" to Montana and Wyoming or comprises their exclusive "birthright". To the contrary, fully three-quarters of these reserves have historically belonged to the federal government and still belong to it.

Uninhibited by the sort of constituent pressure which typically restrains excessive taxes, the Montana legislature set the rate of the tax with an eye toward revenue-maximization, in the mold of the OPEC nations, without regard for any legitimate need. In fact, legislative findings preceding the Montana statute clearly emphasize the intent to appropriate most of the difference between the

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* In this connection, the State of Texas appeared as *amicus* in the court below in favor of plaintiffs. Texas and a number of other states have already filed *amicus* briefs here, as well. Their representations to this effect are compelling.

** Wyoming and its subdivisions impose severance taxes which amount, in the aggregate, to approximately 17%. *See* WYO. STAT. §§ 39-2-202, 39-2-402, 39-6-302(a)-(f), 39-6-303(a) (1977 and Supp. 1980).

market price and the cost of production (including a reasonable profit),* rather than to meet the needs of the state. *See* MONT. CODE ANN. § 15-35-101(1)(e) (1979); Apdx. 62a-63a. When it adopted the severance tax in its 1974 and 1975 sessions, the legislature bypassed the usual biennial budgeting process, in which needs are typically balanced against revenues.

In this instance, the Montana legislature embarked on an approach to state taxation which closely resembles the approach taken by the OPEC nations and certain oil-rich Canadian provinces. Montana went well beyond any concept of its needs—looking instead to exploit the windfall which might be available because of the existing energy crisis—at the expense of its sister states.

Because the case was disposed of below on a motion to dismiss, plaintiffs have never had an opportunity to make a full factual record on this issue. Certain facts nevertheless show that the disparity between needs and revenues is great.

1. Even without a severance tax, the costs of coal mining which impact on the State of Montana would be covered by other taxes** and by federal revenue programs

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* This is referred to in the statute as the "economic rents."

** The State of Montana and its local subdivisions impose a number of taxes on the mining of coal. For example, a resource indemnity trust tax (MONT. CODE ANN. § 15-38-104 (1979)); a gross proceeds tax (§ 15-6-132); a property tax on mining equipment (§ 15-6-138(b)); and a corporate license tax (§ 15-31-101, *et seq.*).

Moreover, all costs of reclamation must be borne by the coal companies. In this regard, the state requires each company to purchase a reclamation bond prior to the commencement of any mining operation in order to ensure that the land will be adequately reclaimed. MONT. CODE ANN. § 82-4-338 (1979).

which predated the severance tax.* Thomas L. Judge, then Governor of Montana, has testified that the state's share of the federal royalties alone was sufficient to cover all of the state's impact costs.** If any further confirmation of this is necessary, it need only be noted that since December 31, 1979, fully 50% of the entire severance tax revenues have been deposited into a constitutional trust fund for future generations which may not be used except upon a three-quarters vote of both houses of future legislatures. MONT. CONST. art. IX, § 5.

2. Experience now shows that legitimate needs have already been met. This is confirmed by studies done by the state, itself,*** and by the plaintiffs here. Moreover, property tax rates in affected communities have been reduced, not raised, since the onset of large-scale coal mining, and the state, itself, has adopted general tax relief

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* As noted, roughly 75% of the coal in Montana is actually owned by the federal government. Under the Mineral Lands Leasing Act of 1920, as amended, Montana is entitled to a direct rebate of 50% of all federal royalties on mineral leases within its borders; additionally, the federal government must use an additional 40% of such royalty revenues on reclamation projects in the affected states. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743, 2770 (§ 317) (codified at 30 U.S.C. § 191 (1976)).

** *Surface Mining Control and Reclamation Act of 1977: Hearings on S.7 Before the Senate Subcommittee on Public Lands and Resources of the Senate Committee on Energy and Natural Resources*, 95th Cong., 1st Sess. 629 (1977).

*** T.O. Cohea, *Coal Board Grants* 15 (January 11, 1978); Robinson, Office of the Montana Legislative Fiscal Analyst, *Coal Impact and Coal Board Grants* 25-26 (September 20, 1977). Indeed, the Coal Board has had a difficult time finding ways to spend all of the severance tax revenues available, and has approved grants for projects which are either well outside the coal-impacted areas or otherwise completely unrelated to impact costs imposed on the state by coal mining. *Id.*

measures for its own citizens which were made possible because of excessive severance tax revenues.*

In fact, while much has been made in public discussions of the need for public funds for "boomtowns," reclamation and other legitimate costs, defendants have admitted for purposes of the motion to dismiss that the tax is not fairly related to the services and protections provided by the state. (Complaint ¶ 26; Apdx. 55a). In support of this allegation, plaintiffs expected to show through a comprehensive economic study they conducted that the legitimate local impact costs—for schools, roads, police, fire and health protection, and environmental protection and the like—might amount to approximately 2¢ per ton, compared to present average revenues from the severance tax alone of over $2.00 per ton.

In sum, if they had had an opportunity for a trial plaintiffs would have introduced evidence which would have demonstrated that revenues expected from this tax were grossly disproportionate to the services and protections provided by the state, however those services and protections may be measured.

The Proceedings Below

In their Complaints, filed in June, 1978, plaintiffs sought a refund of over $5.4 million in taxes paid under protest, a declaration that the tax was invalid under the Commerce and Supremacy Clauses of the United States

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* *E.g.*, 1979 Montana Laws, ch. 698; MONT. CODE ANN. §§ 15-30-112, 15-30-114, 15-30-122, 15-30-142 (1979).

Constitution, and an injunction against its further collection.* (Complaint; Apdx. 45a-61a). Defendants moved to dismiss all of the claims for failure to state claims upon which relief could be granted, and the Montana trial court granted defendants' motion. (J.A. 30a-87a).

On appeal, the Montana Supreme Court passed on these claims as follows:

1. The Montana Supreme Court rejected the contention that the tax constitutes an undue burden on interstate commerce (Complaint ¶¶ 26, 27; Apdx. 55a), finding "that the severance of coal here is a taxable event that precedes entry into interstate commerce" and is "not an interstate activity" and that, in such circumstances, the Commerce Clause imposes no limit on the power of the states to tax. (Opinion 15; Apdx. 18a).

In an alternative holding, the Montana Supreme Court also found as a matter of law that the Montana tax meets the "fairly-related" prong of the four-prong test set forth in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977), holding that the test was met in all cases where the state provided the benefits of a civilized society. (Opinion 19; Apdx. 22a-23a).

2. In Count Two, plaintiffs asserted that the Coal Severance Tax substantially frustrates national policies reflected in a variety of federal statutes intended to

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* In each quarter since then, plaintiffs have filed additional Complaints seeking a refund of successive quarterly tax payments. Additionally, Western Energy Company has filed separate Complaints. In the aggregate, the total amount now in issue exceeds $135 million.

encourage the use of coal, and particularly western low-sulphur coal, to meet national energy requirements. (Complaint ¶¶ 30-32; Apdx. 55a-56a). The decision of the Montana Supreme Court denied there was any such policy or, alternatively, that existing policy favored eastern and midwestern coal. It further held, in effect, that a tax could not be preempted unless it was expressly or by necessary implication shown to be prohibited by federal law.

3. In Count Three, plaintiffs asserted that the Coal Severance Tax also substantially frustrates the national policy reflected in the Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437, to effect a compromise which channels the revenues from federally-owned minerals to the federal government in the first instance, subject to later division with the states in a fixed proportion. (Complaint ¶¶ 34-44; Apdx. 56a-59a). The court below rejected this interpretation on the basis of a proviso in the Act which permitted state taxation of such minerals. (Opinion 33; Apdx. 38a-39a).

SUMMARY OF ARGUMENT

Count One

In reaching its decision, the Supreme Court of Montana relied on a series of decisions from the 1920's dealing with state taxation of the extraction of mineral resources, especially *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922). Under a broad reading of those older cases, activities not "in" interstate commerce were a matter of exclusive state concern which could not be reached by the Commerce Clause.

As even the Supreme Court of Montana recognized, the rationale of *Heisler* and like cases has been expressly rejected by this Court in the last forty years in a wide variety of contexts. (Opinion 8-10; Apdx. 10a-11a). A new and more practical test has been adopted, looking to the substantial effects on commerce of a particular tax or regulation. However, the Montana court rejected application of this modern test as mere *dicta*, and found it inapplicable here. (Opinion 10-11; Apdx. 12a-13a). Instead, the court reaffirmed the continuing validity of *Heisler*, although its rationale has surely long since been discredited.

Under modern Commerce Clause tests which apply here, state taxes which substantially affect interstate commerce may be held invalid if they are not fairly related to the services and benefits provided by the state to the taxpayer, or if they discriminate against interstate commerce. *See, e.g., Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). Appellants have alleged that the present tax fails to pass muster on both of these counts. They should not have been denied the opportunity to prove their case.

Count Two

The Montana tax also raises substantial issues under the Supremacy Clause. The Complaints allege the existence of a national policy to encourage the use and production of coal generally, and of low sulphur western coal in particular, to meet the nation's energy needs. (Complaint ¶¶ 30-31; Apdx. 55a-56a). The Complaints further assert that the excessive Montana tax substantially frustrates those purposes. (Complaint ¶ 32; Apdx. 56a).

The Montana courts rejected these claims as a matter of law, without the benefit of a trial, and in doing so

seriously misperceived both the applicable legal standard and the basic thrust of the federal policy. Thus, the court below denied the existence of a national policy to encourage the production of western low sulphur coal, and also incorrectly held that a state tax statute may not be preempted unless Congress expressly stated an intention to do so. Under prevailing rules, however, state statutes may be struck down where they "substantially frustrate" the purposes and objectives of Congress, whether or not Congress has expressly declared its intention to prohibit the state action. *E.g.*, *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526, 540-41 (1977); *Hill* v. *Florida*, 325 U.S. 538, 542 (1945). Plaintiffs should have been given an opportunity to establish both the existence of the national policies and their frustration by the Montana Coal Severance Tax.

Count Three

Congress has also enacted statutes concerning the use and disposition of western coal deposits, and of the financial benefit flowing from such disposition. Some 75% of the coal in Montana belongs to the federal government. As a result of compromises embodied in the Mineral Lands Leasing Act of 1920, as amended, these deposits were reserved to the federal government. Pursuant to the Act, the coal was to be leased to private interests and the revenues from those leases were to be divided, by statute, in fixed proportions between the federal government and the states. By enacting a severance tax designed to absorb all of the economic rents from those deposits, Montana has substantially frustrated the central purpose of that Act. Thus, under the prevailing preemption principles established by the Court, plaintiffs should have been allowed to prove that the tax is invalid under the Supremacy Clause.

ARGUMENT

I. A STATE TAX ON AN ACTIVITY WHICH "SUBSTANTIALLY AFFECTS" INTERSTATE COMMERCE, WHETHER OR NOT "IN" INTERSTATE COMMERCE, IS NOT IMMUNE FROM SCRUTINY UNDER AN APPROPRIATE COMMERCE CLAUSE TEST

The Montana Supreme Court arrived at its result principally in reliance on the *Heisler* line of cases. *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922); *Oliver Iron Mining Co.* v. *Lord*, 262 U.S. 172 (1923); *Hope Gas Co.* v. *Hall*, 274 U.S. 284 (1927). Under those decisions, an activity not "in" commerce was said to be wholly beyond the reach of the Commerce Clause. From this, the court below derived the conclusion that a state severance tax falls on an activity which "precedes entry into interstate commerce." (Opinion 15; Apdx. 18a). As a result, it concluded that such a tax, whatever its amount, is a matter exclusively of state concern and cannot, in any circumstances, be reached by the Commerce Clause. (Opinion 15; Apdx. 18a-19a).

Under the broad rationale of the *Heisler* line of cases—adopted and applied here by the Montana Supreme Court—all Commerce Clause questions could be decided by a "mechanical test." The test was expressed most clearly in the Court's decision in *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936). There, the majority derived the following rule from *Heisler*, *Oliver Iron* and other like cases (page 303):

> One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce,

> whether such sale and shipment were originally intended or not, has engaged in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce. In respect of the former, he is subject only to regulation by the state; in respect of the latter, to regulation only by the federal government.

This mechanical test—the rule before 1937—is, we submit, utterly inconsistent with constitutional doctrines adopted since that time which clearly recognize the Commerce Clause implications of acts which "substantially affect" interstate commerce, whether they are "in" or "out" of such commerce. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), clearly broke with the *Heisler* test. It held (page 37):

> Although activities may be in*tra*state in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. (Emphasis supplied).

Wickard v. *Filburn*, 317 U.S. 111 (1942), underscored the departure from the earlier rule, extending the commerce power to those "activities in*tra*state which so affect interstate commerce . . . as to make regulation of them appropriate. . . ." *Id.* at 124, *quoting United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942). (Emphasis supplied). It made specific reference to *Heisler* and related cases as "earlier pronouncements," and made clear that such cases no longer accurately reflected the law, even in 1942. *Id.* at 122, n. 21.

Since that time, this Court has consistently held in a variety of ways and contexts that activities which "substantially affect" interstate commerce raise similar Commerce Clause concerns as those activities which are "in" interstate commerce under the older rules. *E.g.*, *McLain* v. *Real Estate Board*, 444 U.S. 232, 241 (1980); *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141, 150 (1979); *Katzenbach* v. *McClung*, 379 U.S. 294, 301-304 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258 (1964).

The first cases applying the newer rule dealt specifically with the power of Congress, but the Commerce Clause principles they announced have by no means been confined to that context. Instead, these new principles represented a fundamental change in the Court's view of the Commerce Clause derived from the proposition that the older, mechanical view of the relationships between the states and the federal government could no longer serve the needs of our complex society and a modern national economy. *See generally* Stern, *The Commerce Clause and the National Economy, 1933-1946,* 59 Harv. L. Rev. 645 and 883, 845-47 (1946).

As the Court has recently reiterated, the principles for determining the sweep and scope of the Commerce Clause apply equally to its "negative implications"—*i.e.*, its restraints on the power of the states—as to its affirmative grant of power to Congress. *E.g.*, *Lewis* v. *BT Investment Managers, Inc.*, 100 S. Ct. 2009, 2015-17 (1980); *Philadelphia* v. *New Jersey*, 437 U.S. 617, 622-23 (1978). A state's tax or regulation is no longer immunized from Commerce Clause scrutiny by a claim that it only attaches to a "local" or in*tra*state activity. *E.g.*, *Hunt* v. *Washington Apple Advertising Commission,* 432 U.S. 333, 350

(1977); *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 141-42 (1970); *Nippert* v. *City of Richmond*, 327 U.S. 416, 423-24 (1946). *See also Parker* v. *Brown*, 317 U.S. 341, 362 (1943).

The modern view is pervasive. We are not aware of any case decided by this Court in recent times—and appellees have not cited any—which supports the view that a state tax which substantially affects interstate commerce is immune from scrutiny under the Clause.*

The Montana Supreme Court did not dispute—and, in fact, tacitly conceded—that this Court's opinions over the years since 1937 have consistently rejected mechanical tests such as that employed in *Heisler* in favor of Commerce Clause tests looking to the practical "substantial effects" of particular activities on commerce. (Opinion 9-10; Apdx. 11a-12a). It nevertheless brushed these cases aside, holding that their rationale had not yet been extended to the precise question of a state's power to tax natural resources and that it did not consider itself bound

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* Two cases have been cited by appellees for the proposition that "cases like *Heisler* have lost none of their controlling force." (Motion 10-11). *See Dunbar-Stanley Studios, Inc.* v. *Alabama*, 393 U.S. 537, 541 (1969); *Alaska* v. *Arctic Maid*, 366 U.S. 199, 203-04 (1961). Both of these decisions stop well short of supporting the conclusion appellees assert in the context of this case. In both cases, a taxpayer argued that an activity in which it was engaged was immune from state tax because it was "in" interstate commerce. Both cases held that the activity was not "immunized" from a state tax simply because a natural resource, once extracted, was to be immediately shipped out of the state for processing and sale.

Plaintiffs have no quarrel with that conclusion, since it simply establishes the power of the state to tax. But it is a conclusion which is essentially irrelevant to the proposition for which Montana cites the cases and which is equally irrelevant to the issues here. The issue in this case is not whether the activity is immune from tax, but whether the tax, itself, is immune from scrutiny under the Commerce Clause.

by "dicta" in other cases decided by this Court. (Opinion 10-11; Apdx. 12a-13a).

This reasoning should be rejected for the following reasons:

1. The *Heisler* decision is not based on any rationale peculiarly applicable to state taxation. Instead, it was based upon the then-prevalent restrictive reading of the Commerce Clause, motivated by a concern that a broader application would (260 U.S. at 259-60):

> nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet "on the hoof," wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to States other than those of their production.

But, of course, that restricted view of the scope of the Commerce Clause has been outmoded for over 40 years.* The "fruits of California" and "the wheat of the West" are now most certainly subject to the Commerce Clause. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970); *Wickard* v. *Filburn*, 317 U.S. 111 (1942). With the disappearance of the rationale for that view, any sensible argument for continued application of the cases based upon it also

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* Except in the State of Montana, whose Supreme Court persists in the startling view that taxes on the production of coal are "ahead of and preliminary to the sweep of the power of Congress to regulate commerce". (Opinion 22; Apdx. 25a). *Compare Arizona Public Service Co.* v. *Snead*, 441 U.S. 141, 150 (1979). Even appellees acknowledge that Congress' power goes this far. (Motion 19-20).

vanished. The court below offered no reason why the rationale of *Heisler*, which has been totally discredited and rejected in every other context for more than 40 years, should nevertheless survive and be applied in a context involving state taxation of natural resources. No reason appears why such a distinction should be drawn other than the parochial desire to sustain this tax. Indeed, it would require a repudiation of over 40 years of Commerce Clause history for this Court to now accept *Heisler* and its rationale as controlling here.

2. The Montana court's reasoning also contravenes at least one case, virtually ignored by the Montana court, which expressly applied the modern rule to the question whether the states and their subdivisions have unfettered power to impose taxes which have a substantial economic effect on interstate commerce when the tax itself is imposed on an act which can be labeled a "local incident." *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946). In that case, the City of Richmond asserted that its tax on the solicitation of sales within the city was immune from scrutiny under the Commerce Clause. This Court rejected that claim, observing that (pages 423-24):

> there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as "separate and distinct" or "local," and thus achieve its desired result.
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> * * * * *
>
> [W]hether or not a "local incident" related to or affecting commerce may be made the subject of state taxation depends upon other considerations of constitutional policy having reference to the *substantial effects, actual or potential*, of the particular tax in suppressing or burdening unduly the commerce. (Emphasis supplied).

3. Distinctions such as those employed by the court below are, in the end, artificial and unsatisfactory, and have long been recognized as such.* They should be rejected for that reason as well.

Consistent with the repudiation of *Heisler,* this Court has enunciated a series of principles relating to the power of states to tax activities which are in or affect interstate commerce. This effort has been "an endeavor to establish a consistent and rational method of inquiry" which focuses on "the practical effect of a challenged tax." *See Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 443 (1980), and cases there cited. This principle should be applied here.

The Montana Supreme Court relied heavily on its conclusion that the "severance of coal . . . precedes entry into interstate commerce." (Opinion 15; Apdx. 18a). As we have shown above, the court below should have examined the practical effects of the tax rather than determining the case by this sort of delineation.**

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* *See* W. Hellerstein, *Constitutional Constraints on State and Local Taxation of Energy Resources*, 31 Nat. Tax J. 245, 248 (1979); *Developments in the Law: Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 970-71 (1962); Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L. J. 219, 232-33 (1957); Posner, *Economic Analysis of the Law*, 510, 513-14 (2d ed. 1977). As all of these authorities show, severance taxes are functionally indistinguishable from other forms of taxation clearly subject to the Commerce Clause. *See Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954).

** Even if one accepts, for purposes of argument, the reasoning that there must be a precise point at which coal "enters" interstate commerce, nothing in logic commends selection of a point following severance for drawing this line. It would be equally logical to say that coal starts its interstate journey at the very moment of severance since, as soon as the coal is severed, it is picked up, cleaned, crushed and delivered to a rail siding for loading onto rail cars and delivery to its final destination in a continuous interstate movement. The selection of *any* point along this continuum to determine constitutional rules is a fundamentally artificial exercise in line-drawing.

There is no point in the continuous process of taking coal from a mine and delivering it for use at which it is necessary or appropriate to prohibit state taxation absolutely, even assuming that the process has become interstate commerce. *See Complete Auto Transit Co., Inc.* v. *Brady*, 430 U.S. 274 (1977). Correspondingly, there is no point at which the state's power to tax activities which substantially impact on that continuous process should be entirely free of review concerning its Commerce Clause implications. At each point along the entire continuum, the issue should be posed as one of balancing and of degree. Any other rule would return us to the antediluvian concepts last expressed here over forty years ago in *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 303 (1936).

4. Finally, the result announced by the court below foreshadows grave practical consequences for this nation. It can only lead to serious division between those states which have access to energy resources and those which do not. In essence, the Montana Supreme Court held that the Commerce Clause imposes no limit whatsoever on the power of the individual states to extract taxes based on the severance of energy resources. This position came into vivid focus when defendants conceded that it would make no difference to their analysis of the case if the tax were not 30%, but were raised to 1,000% or 2,000%. This contention was tacitly accepted by the court below and inevitably follows from its decision. Thus, in its view, the only limitation on the rate of a state's tax substantially affecting commerce is that set by the state's legislature. (Opinion 18; Apdx. 22a). This is a dangerously divisive view.

The availability of energy resources, and the price which they command, is one of the most compelling

issues of our time. Armed with unfettered power and freed from constitutional restraint,* the self-interests of energy-rich states must come into conflict with those which lack such resources, and with the national interest in energy use and sufficiency. Any constitutional rule which permits states to adopt "OPEC-like revenue maximization" policies clearly cuts across the balance between state and federal power lying at the heart of the Commerce Clause and exposes the nation to Balkanization. It offends the basic premise that this nation constitutes a nationwide free trade area in which one state is not permitted to throw up undue trade barriers at the expense of its sister states. *See, e.g., H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 538-39 (1949).

Montana's tax is a prime example of the abuses which may flow from any rule which leaves the states with unfettered power to tax. It was designed to shift billions of dollars to Montana directly from the citizens of other states by the end of the century, and to use a substantial

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* In *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir.) (*en banc*), *cert. granted*, 101 S. Ct. 71 (1980), the Tenth Circuit apparently ascribed equivalent powers to an Indian tribe. One of the appellants in this action, Westmoreland Resources, Inc., is particularly affected by that decision. Westmoreland mines coal in Montana owned by the Crow Tribe. In addition to the 30% severance tax imposed by Montana and substantial royalties payable to the Crow Tribe, the Tribe has attempted to impose an additional 25% severance tax on the coal mined by Westmoreland.

Both Montana and Westmoreland are involved in other proceedings with the Crow Tribe relating to the Montana tax. *Crow Tribe of Indians* v. *State of Montana*, 469 F. Supp. 154 (D. Mont. 1979), *appeal pending*, (9th Cir., No. 79-4321). Westmoreland simply notes here that any standard which permits application of a 30% *and* a 25% tax on the same activity—where neither amount bears any fair relation to benefits bestowed—must necessarily be viewed as an excessive burden on commerce.

part of those billions to create a multi-billion trust fund for future Montana citizens. It is well on its way to achieving that goal.

Continuance of this tax can only lead to the recrimination and retaliation among the states which was the immediate concern of the Founding Fathers when they wrote the Commerce Clause 194 years ago. As Madison stated, the principal reason leading to the adoption of the Constitution was that:

> 'want of a general power over Commerce led to an exercise of this power separately by the States, which not only proved abortive, but engendered rival, conflicting and angry regulations.' 3 Farrand, Records of the Federal Convention, 547.

H.P. Hood & Sons, Inc. v. *Du Mond*, *supra*, 336 U.S. at 534.

* * * * *

For the foregoing reasons, we respectfully submit that this Court should hold that a state does not have unlimited power to tax an activity, such as the mining of coal, which "substantially affects" interstate commerce, and that such taxes are subject to scrutiny under an appropriate Commerce Clause test. Such a holding would conform to the uniform decisions of this Court on related issues over the past forty years and would be in accord with both practical reality and the needs of the nation.

II. THE APPROPRIATE COMMERCE CLAUSE TEST HERE REQUIRES A FACTUAL DETERMINATION WHETHER THE TAX IS FAIRLY RELATED TO BENEFITS PROVIDED BY THE STATE AND WHETHER IT DISCRIMINATES AGAINST INTERSTATE COMMERCE

If ever there were a tax deliberately designed to impose an unreasonable burden on non-residents of the taxing jurisdiction, this tax is it. This fact brings into sharp focus what this Court said in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 288-89 n.15 (1977):

> Any tailored tax . . . creates an increased danger of error in apportionment, of discrimination against interstate commerce, and of a lack of relationship to the services provided by the State. See *Freeman* v. *Hewit*, 329 U.S., at 265-266, n. 13 (concurring opinion). *A tailored tax, however accomplished, must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce.* (Emphasis supplied).

Here, the burden of the tax "is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state." *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 46 n.2 (1940).* In such circumstances, where the political process may fail to work, courts generally—and this Court in particular—have a special burden to apply rigorous standards of review.

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* The conclusion of the Montana Supreme Court that an adequate political check exists (Opinion 22; Apdx. 26a)—based on "judicial notice" of the number of coal industry lobbyists, rather than any factual record in this case—is simply in error. The best evidence of the relative political effectiveness of these lobbyists in the Montana legislature is the current 30% rate of the tax.

Raymond Motor Transportation, Inc. v. *Rice*, 434 U.S. 429, 446-47 (1978); *Austin* v. *New Hampshire*, 420 U.S. 656, 662-63 (1975).

Recognizing the dangers of a tailored tax, this Court has articulated a well-defined, four-pronged factual test to determine the constitutional validity of state taxes which affect interstate commerce. *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). That test has been reiterated not less than four times in the past three years. *Exxon Corp.* v. *Wisconsin Department of Revenue*, 100 S. Ct. 2109, 2122 (1980); *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 443 (1980); *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 444-45 (1979); *Washington Revenue Department* v. *Stevedoring Association*, 435 U.S. 734, 750 (1978). *See also National Geographic Society* v. *California Equalization Board*, 430 U.S. 551, 558 (1977).

As most recently articulated, that test requires the Court to examine:

> the "practical effect" of the tax to determine whether it " 'is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.' "

Exxon Corp. v. *Wisconsin Department of Revenue, supra,* 100 S. Ct. at 2122, *quoting Complete Auto Transit, Inc.* v. *Brady, supra*, 430 U.S. at 279.

The Montana Supreme Court readily assented to the expansion of state powers articulated in *Complete Auto* and like decisions (Opinion 13; Apdx. 15a-16a), but gave short shrift to these corresponding limitations. In addition to rejecting the claim that the Commerce Clause

applies to a state severance tax, it also reached erroneous conclusions concerning the appropriate construction of the "fairly related" prong of the pertinent Commerce Clause test. The construction given to the test by the court below emasculates the test and leaves the state with power to tax without limit.

A. Plaintiffs' Claim that the Tax is Not Fairly Related to Benefits and Services Provided by the State Should Not Have Been Dismissed Without a Trial

The court below held that the "fairly related" branch of the foregoing test may be determined as a matter of law, without any factual inquiry, holding that the test was satisfied simply because Montana provides governmental services and "the advantages of a civilized society" universally afforded by each of the fifty states. (Opinion 19; Apdx. 22a).* This disposition of the problem is much too facile. In the first instance, it fails to give the tax the "careful scrutiny" mandated by *Complete Auto* to determine whether it is, indeed, fairly related to the benefits allegedly bestowed and thus ignores this Court's concern with the dangers to interstate commerce of a tailored tax. In the absence of finding such a relationship, the tax stands exposed for what it is, a naked attempt to export the tax burdens of one state to the citizens of its sister states.

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* The Montana Supreme Court also discarded the "fair relation" test in another way, holding that it did not come into force unless a tax violates another branch of the four-part test as well (*i.e.*, insufficient nexus or faulty apportionment). (Opinion 19; Apdx. 22a-23a). There is not the slightest indication in the opinions of this Court that the "fair relation" test does not require a separate and independent factual analysis of the relationship between the burdens of the tax and the benefits allegedly bestowed.

Furthermore, if the "advantages of a civilized society" satisfy the "fairly related" test repeatedly announced by this Court in recent years in Commerce Clause cases involving state taxes, the test has no real meaning, because it can be met by any state and under all circumstances. If the "fair relation" test is to have any meaning at all, it requires a factual determination to be made in appropriate cases.

If the test is ever to find application, this is the case. This tax bears no relationship at all to the legitimate needs of Montana. Contrary to the holding of the Montana court (Opinion 19; Apdx. 22a-23a), it is not "imposed for the general support of the government". It was enacted by a legislature which made no effort to balance costs and benefits, and instead focused its attention on revenue maximization. Reference to the Legislative Findings and Declarations of Purpose of the tax (MONT. CODE ANN. § 15-35-101 (1979); Apdx. 62a-63a) reveals an overriding intent to exploit the taxability of coal located in Montana, rather than an attempt to meet legitimate impact costs. Far from being used for support of the government, 50% of the massive tax revenues are presently cached away in a trust fund for future generations. Thus, if the absence of a "fair relation" could be shown as a factual matter in any case, it can be done here.

No case has yet come to this Court in which the absence of a "fair relation" has been squarely raised in a factual context.* The decisions of the Court nevertheless

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* *Maryland* v. *Louisiana*, No. 83 Original (October 1979 Term), raises similar claims in its pleadings. In apparent recognition of the factual nature of this inquiry, the parties have initially pressed other issues which, they believe, are dispositive without the necessity of a trial.

clearly suggest that the test is not an empty one, subject to facile disposition. Instead, it is clear that a factual analysis is intended and required. *E.g.*, *Washington Revenue Department* v. *Stevedoring Association*, 435 U.S. 734, 750-51 (1978); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 287 (1977). Cases in lower courts so state. *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537, 545 n.4 (10th Cir.) (*en banc*), *cert. granted*, 101 S. Ct. 71 (1980); *Budget Rent-a-Car of Wash.* v. *Multnomah County*, 287 Or. 93, 597 P.2d 1232, 1239 (1979). Even the trial court in this case squarely held that, if it reached this question, it "would necessarily have to deny the motion to dismiss and proceed to a factual determination." (District Court Opinion 5; J.A. 37a). The contrary holding of the Supreme Court of Montana was simply error.*

Appellees also attack the institutional competence of the courts to apply the "fair relation" test to this and other taxes. (Motion 16). The courts are fully competent to apply such a test and it is vital that they do so here.

We do not contend that a "fair relationship" must be determined with dollar-for-dollar precision by either the legislature or the Court. What must be determined is whether a reasonable relationship exists. Unlike the ordinary case in which such questions might be closely contested, here the Montana legislature grossly overreached, without any study or consideration of the costs or benefits involved, thus making it unlikely that the matter will be in serious dispute if remanded for trial.

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* *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), is not to the contrary. The language from that case on which appellees particularly rely (Motion 15) appears to be merely a restatement of one of the arguments advanced by a party in that case, not a holding of the Court.

Courts have frequently been called upon to apply comparable tests. On several occasions, this Court has determined whether specific state levies exacted more than their "fair share" in relation to the benefits or services provided by the state. *E.g.*, *Evansville Airport* v. *Delta Airlines, Inc.*, 405 U.S. 707, 716-20 (1972); *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 598-600 (1939); *Dixie Ohio Express Co.* v. *State Revenue Commission*, 306 U.S. 72, 77-78 (1939); *Ingels* v. *Morf*, 300 U.S. 290, 296-97 (1937). *See also Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 548 (1950).

The other branches of the four-pronged *Brady* test also provide examples of the competence of courts to apply such tests. Here, too, the states have wide latitude to fashion apportionment formulas but are nevertheless constrained by the outer limits of what is permissible under the Constitution. These outer limits are enforced by the courts. *See*, *e.g.*, *Moorman Manufacturing Co.* v. *Bair*, 437 U.S. 267, 273-75 (1975); *Norfolk & W.R. Co.* v. *Tax Commission*, 390 U.S. 317, 326-27 (1968). This same judicial process should be applied here.

Such judicial restraints are particularly necessary in cases, such as this, in which the normal political restraints do not work to protect the vital interests of those who are unrepresented in the state legislature. *See* discussion at pages 27-29, *supra*. As Professor Tribe put the matter (*American Constitutional Law* 319 (1978)):

> Even judges and commentators ordinarily hesitant about federal judicial intervention into legislative choice tend to support a relatively active role for the federal judiciary when the centrifugal, isolating or hostile forces of localism are manifested in state legislation.

See also R. Givens, *Chief Justice Stone and the Developing Functions of Judicial Review*, 47 U. Va. L. Rev. 1321, 1345-46 (1961).

B. Plaintiffs' Claim That the Tax Discriminates Against Interstate Commerce Should Not Have Been Dismissed Without a Trial

The Montana Supreme Court nowhere expressly passed on plaintiffs' contentions that the tax was adopted because it would shift an extraordinary burden to other states and thereby discriminates against interstate commerce. Plaintiffs' theory of discrimination, however, has been accepted elsewhere as having "considerable force". W. Hellerstein, *Constitutional Restraints on State and Local Taxation of Energy Resources*, 31 Nat. Tax J. 245, 249 (1979). It is based on a proposition which has long been clear—that a tax which is not discriminatory on its face may nevertheless discriminate in fact. *Nippert* v. *City of Richmond*, 327 U.S. 416, 431 (1946):

> It is no answer, as appellee contends, that the tax is neither prohibitive nor discriminatory on the face of the ordinance. . . .

See also Dayton Power & Light Co. v. *Lindley*, 58 Ohio St. 2d 465, 391 N.E.2d 716 (1979) (Ohio coal tax, although seemingly neutral on its face, invalidated on Commerce Clause grounds because it discriminated in practice against non-Ohio coal).

The history of the Montana tax makes it abundantly clear that one of its primary purposes was to shift the tax burden of Montana to the citizens of other states. The

principal sponsor of the tax prepared a memorandum to the legislature which makes this point explicit. Towe, *Explanation of Reasons for Montana's Coal Tax* 4:

> Most of Montana's coal is shipped out of state to power plants and utility companies in the Midwest. In reviewing the [long-term] contracts between the coal companies and the utility companies who purchase the coal, all of the contracts that were shown to our Legislative Committee contain an escalation clause for taxes. In other words, the local companies simply add the additional taxes to their bill, and the entire cost is passed on to the purchasers in the Midwest or elsewhere. Because most of the purchasers are regulated utility companies, it is reasonable to assume these companies will, in turn, pass on their extra costs to their customers.

This prognosis has proved correct. Because of contracts which shift the effects of the tax primarily to non-Montana utility companies and thus directly to citizens of other states, over 90% of the tax burden falls directly on non-Montanans. In Montana, it is understandably a very popular tax. In light of these facts, it is manifest that the tax was "tailored" to fall on interstate commerce and on out-of-state residents. Plaintiffs should have been allowed to make the appropriate factual showing of discrimination.

III. THE TAX SUBSTANTIALLY FRUSTRATES NATIONAL POLICIES WITH RESPECT TO THE PRODUCTION AND USE OF COAL AND SHOULD BE DECLARED INVALID UNDER THE SUPREMACY CLAUSE

A. National Energy Policy, as Reflected in Federal Statutes and Regulations, Favors the Increased Production of Coal Generally and of Low Sulphur, Western Coal in Particular

In the courts below, plaintiffs asserted that there was a national policy favoring the production and use of coal, and particularly low sulphur western coal, over alternate forms of energy. (Complaint ¶¶ 30-31; Apdx. 55a-56a). Plaintiffs further alleged that the Montana Coal Severance Tax stood as an obstacle to and substantially frustrated these national policies. (Complaint ¶ 32; Apdx. 56a).

The Supreme Court of Montana also had difficulty in dealing with this issue. In the course of its opinion it found, variously, that (a) "no national policy can be discerned as a matter of law" (Opinion 29-30; Apdx. 34a-35a); (b) that there was a national policy which favored the production and use of coal, but not of low sulphur western coal (Opinion 29; Apdx. 34a); and (c) as an apparent refinement of the foregoing, that Congress preferred that "eastern and midwestern plants used local coal, even coal with higher sulfur content than western low-sulfur coal" (Opinion 29; Apdx. 34a).

Having thus found that there was no national policy, or, if it did exist, that it favored eastern and midwestern coal in at least some circumstances, the court did not find it necessary to squarely face the question whether the Montana Coal Severance Tax substantially frustrated a

national purpose. In thus denying plaintiffs a trial, the Montana courts were plainly in error. Plaintiffs should have had an opportunity to demonstrate, to the extent necessary, both the existence and contours of the national policy, and the adverse impact of the Montana Coal Severance Tax on that policy.

1. The National Policy to Encourage Coal Production

It is beyond doubt that, since the OPEC oil embargo of 1973, national policy has clearly favored the increased production and use of coal to meet our nation's energy requirements. This policy is reflected in the express language of statutes,* in legislative history and findings, and in official pronouncements by the President and members of his Cabinet.**

The district court's opinion expressly recognized this national policy (Opinion 20; J.A.), and its holding to this effect was expressly recited by the Montana Supreme Court (Opinion 26; Apdx. 30a).

In the face of explicit statutory materials such as those cited, it would have been difficult to avoid the conclusion

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* *See* statutes listed in the footnote at page 5, *supra*. Each of these federal statutes is a "Law of the United States" which the Supremacy Clause mandates "shall be the supreme Law of the Land." U.S. CONST., art. VI, cl. 2. Selected portions of these statutes are reprinted in the Appendix to the Jurisdictional Statement at pages 71a-115a.

** *See, e.g.*, Energy Policy and Conservation Act of 1975, 89 Stat. 874 (§ 2(6)), 42 U.S.C. § 6201(6) (1976); *National Energy Plan II* (prepared pursuant to 42 U.S.C. (Supp. III 1979) § 7321) at 12, II-21 (May 7, 1979); President Carter, Statement on Signing National Energy Bills (November 9, 1978), *reprinted in Weekly Compilation of Presidential Documents*: Vol. 14, No. 45; James R. Schlesinger, Remarks before 61st Anniversary Convention of the National Coal Association at 2 (June 6, 1978) (unpublished Department of Energy Release).

that national policy favors increased reliance on coal. For example, the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289, 42 U.S.C. (Supp. III 1979) §§ 8301 *et seq.*, expressly states that one of its purposes was:

> to encourage and foster the greater use of coal and other alternate fuels, in lieu of natural gas and petroleum, as a primary energy source . . . .

92 Stat. 3291 (§ 102(b)(3)), 42 U.S.C. (Supp. III 1979) § 8301(b)(3). Among other things, that Act prohibits new electric power plants from using oil or natural gas as a primary fuel source, and prohibits the use of natural gas in existing facilities after 1989. 92 Stat. 3298 (§ 201), 42 U.S.C. (Supp. III 1979) § 8311. Although existing plants which used natural gas as a primary source during 1977 may continue to do so until January 1, 1990, they are limited under the Act to their historical consumption. 92 Stat. 3305-6 (§ 301), 42 U.S.C. (Supp. III 1979) § 8341. Although many details reflective of the statutory purpose could be advanced, the manifest purpose of this Act to favor the use of coal is clear.*

2. The National Policy to Encourage Production of Western, Low Sulphur Coal

The statutes, regulations and other materials reflecting the national energy policy to encourage the production of low sulphur western coal are complex, and the Montana courts' examination of them—without the benefit of

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* *See, e.g.*, S. Rep. No. 95-361, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 8173, 8179-80; H.R. No. 95-496 (Part IV), 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 8454, 8457; Remarks of Douglas M. Costle, Administrator of the Environmental Protection Agency, [1978] U.S. Code Cong. & Ad. News 8232.

testimony and documentary evidence—was notably cursory.*

Plaintiffs asserted that the Clean Air Act, as amended in 1970, Pub. L. No. 91-604, 84 Stat. 1676, showed a national intent to maximize the production and use of western low sulphur coal. Although the mechanisms by which the Clean Air Act encouraged the use of low sulphur coal are complex, the testimony of the users of coal and others would have left no doubt that the Act was directed to that end.

Under the 1970 Amendments, the Environmental Protection Agency ("EPA") was authorized to establish standards regulating the maximum sulphur dioxide (SO_2) emissions that would be permitted from new facilities in certain categories of industries. *See generally* 84 Stat. 1683 (§ 111). In 1971 the EPA promulgated its original new source performance standards. These regulations required a reduction of up to 75% of sulphur dioxide emissions from power plants burning high sulphur coal, but imposed no controls for plants burning low sulphur coal. 40 C.F.R. §§ 60.43; 60.45(a)(2) (1972). *See* 36 Fed. Reg. 24876 (1971). The direct result of these federal statutes and regulations in existing market conditions was a virtual mandate for the use of western, low sulphur coal. Thus, there was a dramatic increase in demand for such coal as evidenced by the sharp increase in Montana's coal production during the early 1970's.** The effect of the Act continues to be felt today.

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* From the outset, plaintiffs have maintained that a trial was necessary in order to set forth the contours of the national energy policy and its practical effect. *See* 2A C. Sands, *Sutherland Statutory Construction*, § 45.13 at 44 (4th ed. 1973).

** Production of coal in Montana increased from 1,280,000 tons in 1970 to 27,393,000 tons in 1977, but has since leveled off. (Figures were supplied to plaintiffs by the Safety and Health Division, Department of

(Footnote continued)

The court below ignored the essential thrust of this statute. It looked, instead, to the 1977 Amendments which were designed to alleviate some of the economic distress in eastern and midwestern coal mining areas caused by the earlier dramatic shift to western coal. Thus, the 1977 Amendments made minor adjustments to the overall federal policy to encourage modestly the production of high sulphur eastern and midwestern coal. (*See* Opinion 29; Apdx. 34a). The legislative history of the 1977 Amendments makes clear, however, that they did not fundamentally change the vigorous national energy policy to encourage the production of western coal, and that Congress intended "continued strong demand for low-sulphur coal in all regions of the Nation," including the west. H.R. Rep. No. 294, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. Code Cong. & Ad. News 1077-1577 at 1245. In no sense can the 1977 Amendments be read as a reversal of the previous national policy to encourage the production of western low sulphur coal.*

By focusing on a side issue—whether "Congress would rather that eastern and midwestern plants used 'local coal,' even coal with higher sulfur content than western low sulfur coal" (Opinion 29; Apdx. 34a)—the Montana courts missed an important additional aspect of the over-

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(Footnote continued)

Worker's Compensation of the State of Montana Department of Labor. *See also* Opinion 4; Apdx. 6a).

* According to the EPA, even after the 1977 Amendments are taken into account, production from the Northern Great Plains must grow from 54 million tons in 1975 to 602 million tons in 1995, or more than eleven times, to meet national goals; if the 1977 Amendments had not been adopted, the growth would have been to 630 million tons. *See* Table 4, *EPA Tables Relating to New Standards for New Coal-Fired Power Plants* (May 25, 1979). *See also* Bureau of Land Management of the Department of Interior, *Final Environmental Statement, Federal Coal Management Program* at 2-31 (April 1979); U.S. Department of Energy, *Energy Supply and Demand in the Midterm: 1985, 1990, and 1995* at 106 (April 1979).

all national policy. In many regions of the country, the *only* feasible source of coal is western coal; in those regions, the choice between eastern and western coal does not exist as a practical matter. If one accepts that there is a federal policy to use coal generally, it must necessarily mean the use of western coal.

For example, we call the Court's attention to the following representation of the State of Texas to the court below (Brief *Amicus Curiae* of the State of Texas at 17-18):

> [F]or economic reasons, Western coal is the only practical energy alternative for Texas and probably most of the western United States. Texas would show at [a] trial on the merits that the high cost of transportation of Eastern coal to Texas precludes its use and use of Midwestern coal is a break-even proposition only at Texas cities served by barge. When the added costs of inland rail transportation from dock to generating plants are added to the costs of pollution and pollution control for the higher sulphur content of the Midwestern coal, *Western coal is clearly seen as being the only feasible alternative to the use of petroleum*.
>
> For Texas and perhaps most of the West, Western coal is practically the only coal. The coal tax, however, frustrates the use of that coal. (Emphasis supplied).

The fact is that for parts of the country western coal is the only feasible alternative. Therefore, the policy to encourage coal generally—apparently accepted by the Montana courts— must mean encouragement of the use of western coal.

At a minimum, if there were any question about this policy it should have been resolved at a plenary trial where the policy could have been explored through the testimony of regulators, administrators, and expert wit-

nesses. The Montana courts' parochial and cursory review of this complex subject does not provide an objective answer to the issue of the contours of this national policy. At a minimum, a trial was required.

B. The Issue of "Substantial Frustration" Raises Questions of Fact which Require A Trial

The Montana courts not only misperceived the contours of our national energy policy, but also the basic constitutional standards set forth by this Court. Although the court below, at times, paid lip service to the "substantial frustration" test, it basically held that the tax could not be preempted under the Supremacy Clause unless it was expressly or by necessary implication shown to be prohibited by federal law. (Opinion 27; Apdx. 31a). This is plainly wrong.

The paramount power of federal law under the Supremacy Clause with respect to state tax legislation was firmly established over 150 years ago in the landmark decision, *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Since that time, a number of other state taxes have been struck down because their effect has substantially frustrated a Congressional purpose or otherwise conflicted with federal law. *E.g.*, *Weston* v. *The City Council of Charleston*, 27 U.S. (2 Pet.) 449 (1829). *See also Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *New Jersey Insurance Co.* v. *Division of Tax Appeals*, 338 U.S. 665 (1950); *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414 (1940).

As this Court has stated on numerous occasions, there are three separate tests to determine the validity of a state statute challenged on Supremacy Clause grounds. A state statute is unconstitutional if:

1. Congress has *expressly* preempted the particular field of state regulation to the total exclusion of the states; or if

2. The structure and purpose of federal regulation with respect to a particular subject matter is so pervasive as to "clearly and unmistakably" require the conclusion that Congress *intended* to prohibit all state action; or if

3. It conflicts with a federal enactment and stands as an obstacle to its execution, either directly or by frustrating the full effectiveness of the federal law.

Plaintiffs here relied on the third test of preemption from the outset. The Complaints allege (¶ 32; Apdx. 56a):

> 32. The Coal Severance Tax, on its face and as applied, substantially frustrates and impairs fulfillment of the foregoing national policies and, in particular, frustrates and impairs the purpose of the aforementioned Acts of Congress.

Under this preemption test, any state legislation which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" or "frustrates the full effectiveness of federal law" is invalid. *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525-26 (1977), *quoting Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *Perez* v. *Campbell*, 402 U.S. 637, 652 (1971). This is so irrespective of whether Congress specifically intended to preempt the particular state statute.

The issue here is whether, in the absence of any specific conflict apparent on the face of a federal statute, a state

statute which "substantially frustrates" the objectives of federal legislation is preempted by the Supremacy Clause. In this connection, it is well settled that a finding of substantial frustration may be based on an interference not apparent on the face of a statute. *E.g.*, *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 540-43 (1977); *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239 (1967); *Hill* v. *Florida*, 325 U.S. 538, 542-43 (1945). Plaintiffs do not contend—and do not need to show—that the Montana Coal Severance Tax creates a head-to-head conflict with a federal statute,* something the Montana courts seem to require. Indeed, on several occasions state laws have been held unconstitutional even though no direct conflict with federal law existed. The court below completely ignored these cases.

For example, in *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967), the Court struck down a state statute prohibiting payment of unemployment compensation benefits where the unemployment was due to a labor dispute. There, as here, the state statute was said not to conflict on its face with any federal statute. Nevertheless, the Court invalidated the state statute under the Supremacy Clause because it found that the effect of requiring a worker to choose between collection of unemployment benefits or filing an unfair labor charge had a direct

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* In fact, this Court has held that a state statute may unconstitutionally frustrate *any* Congressional enactment, even though the state and federal statutes apply to entirely different areas or subject matters. Thus, in *Perez* v. *Campbell*, 402 U.S. 637, 649-52 (1971), the Court held invalid a state law which suspended drivers' licenses of persons who failed to pay judgments in law suits involving automobile accidents because the suspension conflicted with federal legislation regulating discharge in bankruptcy.

tendency to frustrate a broad policy of Congress (as reflected in the National Labor Relations Act) to encourage the filing of unfair labor practice charges. In so doing, the Court stated (page 239):

> Florida should not be permitted to defeat or handicap a *valid national objective* by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan. (Emphasis supplied).

Accord, *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 540-43 (1977); *Hill* v. *Florida*, 325 U.S. 538, 542-43 (1945).*

For these reasons, the court below erred in holding that the Montana Coal Severance Tax is not preempted because the federal statutes declaring it to be national policy to encourage coal production do not also expressly and specifically prohibit or limit state severance taxes. Carried to its logical conclusion, this would mean that no tax or

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* *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978), which was relied on by the court below (Opinion 30-31; Apdx. 35a-36a) for the proposition that a state statute cannot be preempted by a broad national policy, is readily distinguishable. First, the federal statutes involved here are much more specific—the Montana Coal Severance Tax not only frustrates Congressional objectives in enacting these laws, but in some instances stands as a direct obstacle to the implementation of specific statutory provisions. *See*, *e.g.*, Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289, 3298 (§ 201), 3305-6 (§ 301), 42 U.S.C. (Supp. III 1979) §§ 8301, 8311, 8341. Secondly, the Court's determination in that case concerning the issue of "substantial frustration" was made after a full trial and on the basis of a printed record which was over 750 pages long and which included the testimony of no less than five expert witnesses concerning the effect of the state statute on competition. *See* Appendix to appellate briefs in the Supreme Court of the United States, Dkt. Nos. 77-10, 77-11, 77-12, 77-47, and 77-64, filed November 17, 1977.

other form of state legislation, not expressly or implicitly prohibited or limited by Congressional legislation, would ever be invalidated, regardless of the effect it may have on federal policy.

This is not, and should not be, the law. In order for our national government to function effectively, it is imperative that the fifty individual states not be permitted to enact separate laws which have the practical effect of frustrating the effectiveness of federal law. Congress is not, and should not be, required to anticipate all of the myriad ways in which states may frustrate the effectiveness of its laws. Given the wide scope of federal legislation today, this would be an impossible task and would render the effectiveness of the Supremacy Clause a virtual nullity.

Under the circumstances, it is apparent that a trial is necessary here to explore the factual issues raised in Count Two of the Complaint. At trial, plaintiffs would prove, among other things, that the Montana Coal Severance Tax has already had, and will continue to have, a substantial adverse effect on the Montana coal production necessary to implement Congressional policies. In this connection, they are prepared to proffer expert testimony (based on extensive studies and computations) designed to show (i) that without the tax, production of Montana coal would rise an additional 20 million tons annually by 1990, and (ii) because of the tax, planned mines in Montana have not opened, existing mines are operating below capacity, coal contracts have been cancelled, and new contracts for Montana coal have dropped off precipitously.

Plaintiffs' allegations that the Montana Coal Severance Tax "substantially frustrates and impairs" fulfillment of certain national energy policies raises questions of fact which, for purposes of defendants' motion to dismiss, must be accepted as true. *See generally Buttrell* v. *McBride Land & Livestock*, 170 Mont. 296, 553 P.2d 407 (1976). Consequently, Count Two of the Complaint states a valid claim under the Supremacy Clause and the court below erred in dismissing it prior to trial.

IV. THE TAX SUBSTANTIALLY FRUSTRATES THE FEDERAL STATUTORY DIVISION OF ROYALTIES FROM FEDERAL COAL DEPOSITS AND SHOULD BE HELD INVALID UNDER THE SUPREMACY CLAUSE

In Count Three, plaintiffs assert that the Montana Coal Severance Tax violates the Supremacy Clause of the United States Constitution because the tax grossly distorts the compromise between the federal government and the states expressed in the Mineral Lands Leasing Act of 1920 (ch. 85, 41 Stat. 437) (the "1920 Act"), as amended by the Federal Coal Leasing Amendments Act of 1975 (Pub. L. No. 94-377, 90 Stat. 1083), and thus "substantially frustrates" the central purposes of these Acts. (Complaint ¶¶ 41-44, Apdx. 58a-59a). This federal legislation was the culmination of more than a century-long, sometimes divisive, debate concerning the ownership, disposition and use of federally-owned mineral reserves in the western territories and states.*

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* *See, e.g.*, H.R. Rep. No. 17 (Part 1), 64th Cong., 1st Sess. 3 (1916); H.R. Rep. No. 17 (Part 2), 64th Cong., 1st Sess. 8 (1916) (minority views); H.R. Rep. No. 668 (Part 2), 63d Cong., 2d Sess. 6 (1914) (minority views); 53 Cong. Rec. 980-81 (1916) (remarks of Rep. Taylor—Colo.).

In the end, the federal government retained the minerals for the people of the nation, subject to payment of an agreed upon share of the mineral royalties to the states in which the minerals were located. Ch. 85, §§ 1-2, 41 Stat. 437-38; ch. 85, § 35, 41 Stat. 450. On this basis, a long-standing regional dispute was finally compromised and resolved.

The court below did not dispute the district court's holding that the purpose of the 1920 Act was to share the "economic rents" from federally-owned coal deposits between the federal and state governments in the prescribed proportion provided by the statute. (*See* District Court Opinion 29-30; J.A. 84a). As noted above (pages 9-10, *supra*), these "economic rents" are the difference between the costs of production, including a reasonable profit, and the market price of the coal. This difference is normally available for payment of royalties or production taxes.

Plaintiffs allege that the tax is so excessive in amount that it seriously undercuts and disrupts this compromise by explicitly appropriating directly to Montana a major part of the "economic rents" attributable to the extraction of federally-owned coal, contrary to the mechanism adopted by the Acts. MONT. CODE ANN. § 15-35-101(e) (1979), Apdx. 62a-63a; Complaint ¶ 41, Apdx. 58a. This is so for the following reason: the higher the proportion of economic rents appropriated for the severance tax, the less that will be available for payment of royalties to the federal government. Potential coal producers, in calculating the amount they are willing to bid in royalties for federal leases, will necessarily compute the amount of state tax payable on production and must naturally reduce the amounts they are willing to bid for royalties accordingly.

The severance tax was expressly designed to absorb the available economic rents in this fashion.* In doing so, it directly conflicts with the scheme of the 1920 Act.

The reliance by the court below (Opinion 32-33; Apdx. 38a) on a proviso in the 1920 Act was misplaced. It held that the tax was not preempted because the Act specifically provided that the states could impose taxes, and did not impose any corresponding limitation on this right of the states to tax. (Opinion 32-33; Apdx. 38a). The 1920 Act did recognize the right of the states to impose *some* tax on coal, but that point is essentially irrelevant here. The Act specifically provides (ch. 85, § 32, 41 Stat. 450, 30 U.S.C. § 189 (1976)):

> Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise *any rights which they may have*, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States. (Emphasis supplied).

This proviso must be read in light of its purpose, and not in a manner which violates the central purpose of the Act. C. Sands, *Sutherland Statutory Construction*, §§ 20.22 at 74-75, 47.12 at 92 (4th ed. 1972-73). The proviso was included because Congress believed the royalty and rental payments provided by the Act might not necessarily be sufficient to cover legitimate impact costs. *E.g.*, 58 Cong. Rec. 7646, 7649 (1919) (remarks of Rep. Mondell). There is no suggestion anywhere that Congress

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* Thus, the statute provides (MONT. CODE ANN. § 15-35-101(e) (1979)):

> [C]oal in Montana . . . is in sufficient demand that at least one-third of the price it commands at the mine may go to the economic rents of royalties and production taxes.

used a proviso of this type as a license to the states to pass unwarranted taxes and thus upset the compromise which was the basis of the Act.

Mid-Northern Co. v. *Montana*, 268 U.S. 45 (1925), cited by the court below (Opinion 33, Apdx. 39a), does not support the position that Montana has an unfettered right to impose severance taxes on federal coal. In that case, this Court merely held that lessees of the federal government, such as plaintiffs here, were not *immune* from state severance taxes, in that case a tax of 1%. Neither the proviso in the 1920 Act nor the *Mid-Northern* case speaks to the issue here. Neither should be read as a license to a state to frustrate the central purposes of the federal scheme by appropriating to itself the economic rents from the mining of coal.

The preemption principles previously discussed in connection with Count Two of the Complaint (pages 41-46, *supra*) are equally applicable here. In this respect, the fact that Congress did not specifically limit the amount of state taxes is not controlling. Any state statute which substantially frustrates the "accomplishment and execution of the full purposes and objectives of Congress" is rendered invalid by the Supremacy Clause. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

The purpose of these Acts was to divide the mineral wealth owned by the federal government in accordance with a prescribed formula. By enacting the Coal Severance Tax, Montana has in effect declared that the federally-owned coal which is mined there pursuant to the provisions of the 1920 Act, as amended, belongs to the people of Montana—not to the nation as a whole. By collection of this tax, Montana has effectively appropriated to itself the economic rents from such coal development and has thus far overstepped an exception de-

signed only to permit additional taxes necessary to cover excess impact costs. Plaintiffs thus contend that the tax substantially frustrates and impairs the important federal policies set forth in the 1920 Act.

Under the circumstances, the court below erred in affirming the district court's dismissal of Count Three of the Complaints.

CONCLUSION

For each of the reasons set forth above, the judgment below dismissing the Complaints should be reversed and the case remanded for trial.

Respectfully submitted,

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